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(section C. above). The *Varney* doctrine of subsidiarity of recompense to other actions never was as general as is commonly supposed and it is submitted that its successor doctrine of subsidiarity of enrichment claims to other claims should have a restricted role in the future development of Scots enrichment law.

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WS Karoulias SA v The Drambuie Liqueur Company Ltd

A. INTRODUCTION

The decision of Lord Clarke in *WS Karoulias SA v The Drambuie Liqueur Company Ltd*¹ illustrates the difficulties of determining whether or not a legally enforceable agreement has been created—a question of “basic contract law”,² yet complex enough to warrant a proof, a proof before answer and a thirty-page case report.

The issue to be decided was whether or not there was a binding contract between the parties by virtue of “a document attached to an email... which, although it contained a testing clause, was, in the event, never executed by either of the parties”.³ Following the termination of past and present relations between the parties by Drambuie, Karoulias raised this action for specific implement of the alleged contract between them for future distribution services. The outcome therefore depended on Lord Clarke’s determination as to the status of this putative contract. Given the lengthy and complex relationship between the parties, it is useful to set out the facts briefly before turning to consider Lord Clarke’s decision and its reasoning.

B. THE FACTS OF THE CASE

Karoulias had acted as Drambuie’s distributor in Greece since at least 1977 and had, over the years, built up the presence of the Drambuie brand so that the Greek market was the second largest market worldwide for the Scottish liqueur. As of 1991, the parties had entered into formally executed written contracts to govern their relationship, the latest of which, the 1998 agreement, was due to reach the end of its initial term in July 2003.⁴ In 2002 the parties therefore commenced negotiation of a new five-

1 2005 SLT 813.

2 Per Lord Clarke at para 1.

3 Per Lord Clarke at para 1.

4 The 1998 agreement would continue beyond July 2003 if neither party served notice of termination, but thereafter either party could terminate on serving six months’ written notice. Karoulias, in evidence, explained that such a short notice period was uncommercial and unusual in their industry, where distribution agreements usually had a term of five years to allow for long-term investment and development of

year distribution agreement to take effect at the expiry of the 1998 agreement.

By January 2003, negotiations were drawing to a close and Drambuie's director of corporate affairs was able to send a draft contract, by email, to Karoulias on 30 January 2003, with the message: "I am attaching for your approval the final draft of the Agreement... Once you have confirmed that it is in order I shall send two copies for signature."⁵ Six days later, on 5 February 2003, Karoulias' managing director responded by email to say "Many thanks for the above final draft which is ok with thanks from us. So pls. send us two copies for signing."⁶ It was therefore common ground that negotiations had concluded on 5 February 2003.

No engrossment copies were dispatched by Drambuie, however, although over the next few months Karoulias sent intermittent emails requesting them. Both parties met in London in May 2003 to discuss the launch of a new Drambuie product and, at that meeting Karoulias' managing director became aware that Drambuie was in fact now talking to another company about distribution in Greece. Following that meeting, Drambuie's director of corporate affairs emailed Karoulias on 2 June asking if they could make a number of "tweaks" to the agreed version of the contract. Although it appears that Karoulias' suspicions should have perhaps been raised at this point, Drambuie's email of 2 June managed to allay such fears by stating "Our commitment to Karoulias and more particularly to you [i.e. Karoulias' managing director] is absolute".⁷ Despite this reassurance, Drambuie then proceeded on 11 June to serve six months' notice of termination of the 1998 agreement.

At this stage, Karoulias was in a commercially delicate position. Its relationship with Drambuie would formally terminate in December 2003, unless the new agreement, finalised on 5 February that year, was enforceable. Karoulias' managing director made clear in his evidence that, given Drambuie's position regarding a new distributor, Karoulias did not wish to rock the boat by threatening legal remedies and, instead, chose to take a conciliatory approach in an attempt to prevent any damage to their relationship and to secure its continuation. These tactical concerns failed to protect its commercial interests and ultimately damaged the strength of its legal position in court.⁸ Karoulias' position was not helped by Drambuie who continued to imply that their relations would be ongoing, or, in the words of Lord Clarke, "strung the pursuer along"⁹ from June to December 2003, while negotiations with the new distributor were underway. Finally, on 2 December, Drambuie informed Karoulias that a new distributor had been appointed for the Greek market and that, as of 31 December, Karoulias' services were no longer required.

the brand. They would therefore require a new agreement with a new term, rather than allowing the 1998 agreement to continue on a six-month rolling basis.

5 At para 8.

6 At para 8.

7 At para 13.

8 In particular, Lord Clarke felt that this argument was to some extent an *ex post facto* rationalisation of Karoulias' failure to assert their legal rights between June and December 2003, and concluded, at para 50, that these explanations "do not provide a plausible explanation for the *complete* lack of reference by [Karoulias]... to the existence of an established binding agreement", which could have been done without going so far as to threaten legal proceedings.

9 At para 52.

Karoulias responded by suing for specific implement, in which it contended that the parties had reached final agreement on 5 February 2003 (when Karoulias accepted the latest draft from Drambuie) and that, as a result of this *consensus in idem* there was a binding and enforceable contract between them. In its defence, Drambuie refuted the existence of an enforceable contract and claimed that, although negotiations had concluded, there was no *intention* to be bound until the contract had been formally executed by both parties. As the final agreement had not been signed by either party, it remained an unenforceable draft contract, from which Drambuie were perfectly at liberty to walk away. Drambuie also challenged Karoulias' claim for specific implement, claiming that the appropriate remedy was an award of damages.

An initial point to note is that Lord Clarke rejected Drambuie's challenge to the action for specific implement and reaffirmed the availability of specific implement in Scots law in this situation.¹⁰ He stated that it was not open to Drambuie to contest, at the stage it did, the availability of the remedy.

C. THE DISPUTE AND THE DECISION

The dispute as to contract formation therefore turned on whether the final draft contract of February 2003 was sufficient to establish agreement and full *consensus in idem* between the parties, or whether it was no more than an agreement of future terms that would form the contract when the parties chose to enter into it formally at a later date, demonstrating such intention by their execution of the written document.

At the initial hearing in 2004¹¹ before Lord Clarke, Karoulias was able to establish sufficient grounds for a proof before answer, which was heard in the first half of 2005. Even at this early stage, however, Lord Clarke observed that Drambuie's argument in relation to contractual intention raised "a formidable question over the pursuer's case".¹²

And so it proved. In his judgment following the proof before answer, Lord Clarke held that "The evidence in this case...persuaded me that the intention of the parties was that they would only become bound by the terms of that document only when it was signed on behalf of them."¹³

Two notable legal doctrines raised by this decision merit further consideration. The first, contractual intention, was the foundation for the judicial decision. The second, good faith in contract, was conspicuous by its absence.

(1) Contractual intention

Contractual intention—the requirement that both parties to an agreement intend

¹⁰ At para 56.

¹¹ 2004 GWD 31-638; [2004] ScotCS 189.

¹² [2004] ScotCS 189 at para 32. At this stage, Lord Clarke also heard submissions from Drambuie to the effect that the 1998 Agreement contained a clause stating that any modification to the agreement must be in writing and signed by duly authorised officers of both parties. As the draft 2003 agreement was a "modification" of the 1998 Agreement, Drambuie claimed, it would need to meet these requirements before it could take effect. Lord Clarke dismissed this argument as being "entirely misconceived" (at para 32).

¹³ At para 53.

their arrangement to be legally binding¹⁴—is generally recognised as being one aspect required for the formation of a contract,¹⁵ along with consensus and capacity. Scots law has tended to give priority to the need for *consensus in idem* and to presume that such an intention will be present in commercial contracts, unless the parties take steps to agree objectively otherwise.¹⁶ Conversely, “social” agreements carry a presumption that the parties do *not* have the requisite contractual intention, unless it can be established objectively.¹⁷ As this was a commercial contract between two companies which had a history of trading together, a cautious legal advisor would certainly have had justification for pointing to the completed negotiations and the final draft contract as objective evidence of *consensus*, together with section 1(1) of the Requirements of Writing (Scotland) Act 1995,¹⁸ and concluded that the written but unsigned contract was all that was required to form an enforceable contract, in a situation where intention could safely be presumed.

This approach was rejected by Lord Clarke however, who stated, “it is important, in my view, to recognise that while there may be complete agreement between parties, in the sense of negotiations being over, there may not necessarily be a binding agreement.”¹⁹ To this extent, intention was used to imply a condition delaying conclusion until execution. As the parties were not yet contractually bound, nor was there any obligation on either to take “the further necessary steps to complete the contract”,²⁰ there was *locus poenitentiae* as recognised by Gloag, albeit not explicitly referred to in court. This modern application of *locus poenitentiae* can be interpreted in three possible ways.

Firstly, it can be seen as a straightforward application of the standard presumption as to contractual intention. As noted above, this presumption can be rebutted, allowing parties in commercial situations to prove that they did *not* possess the necessary contractual intention. Applying this interpretation, Drambuie’s evidence was sufficient to rebut the presumption and to show that it did not intend to be bound by the contract at the moment of conclusion of negotiation, on 5 February, but only once authorised representatives of both parties had signed on the line. As this element was not fulfilled, there was agreement as to contract terms between the party but no enforceable contract.

14 For example, see W M Gloag, *The Law of Contract*, 2nd edn (1929), 7, where he refers to “an intention to bind oneself by agreement”. See also W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001), para 5-02; H L MacQueen and J Thomson, *Contract Law in Scotland* (2000) para 2.64; and, regarding English law, G Treitel, *The Law of Contract*, 11th edn (2003), 162.

15 For one particular debate on this issue, see McBryde, *Contract* para 5-06, note 25 and the authorities referred to therein.

16 See Gloag at 9; McBryde, para 5-06; Treitel at 171. MacQueen and Thomson suggest that this presumption can be explained on grounds of practicality, whereby it would be inefficient for the court to enquire into the parties’ intentions in every commercial situation (para 2.64). (All reference to texts at note 14 above.)

17 E.g. *Robertson v Anderson* 2003 SLT 235.

18 Which states that “writing shall not be required for the constitution of a contract”. The exceptions to this rule, provided in section 1(2), do not encompass a distribution agreement.

19 At para 50.

20 Gloag, *Contract* at 46.

A second, more progressive, interpretation is that the decision can be seen as an explicit declaration by the court that the role of intention is developing and that it should no longer be seen merely as a rebuttable presumption. Instead, intention now plays a crucial role in regulating the relationship between parties. For example, the requirement for intention could be used to confer upon contracting parties the freedom to introduce their own contractual rules governing formation, such as a requirement for a written document where one would not otherwise be required, as in this case. This would allow parties to regulate their relationship in accordance with their own preferences, by creating a final hurdle prior to conclusion: the need for evidence of intention to enter into a binding legal relationship. Until that moment, there is *locus poenitentiae*, and either party can walk away. Support for this approach comes from Lord Clarke's judgment, where he states that the question at issue is

whether or not it was the parties' intentions, as objectively discerned from the relevant facts and circumstances that, notwithstanding that they had agreed the terms of the deal, they had *postponed its coming into legal effect* until they acknowledged its terms formally by executing the document in which the terms were set out.²¹

Until the necessary contractual intention was objectively demonstrated, the only agreement reached by the parties on 5 February was an agreement to sign a contract at an unspecified future date, or perhaps an agreement as to the terms of the future contract to be signed, rather than agreement as to the contract itself. This interpretation also recognises the complex layers of intention and future intention present in every contract.²² Thus, the intention to enter into negotiations, the intention to provide goods or services of a specific type, the intention to draft a contract or conclude negotiations are usually present in all contracts, but the focus remains with the final agreement reached between the parties: the contract itself, which will only come into existence once there is a concluded intention to enter into a legally binding relationship.²³

This line of argument can in fact be seen as a development of the rebuttable presumption argument noted above: intention will be presumed unless it can be demonstrated that it was the intention of both parties to impose an additional hurdle to the conclusion of their contract. It is nonetheless an important development of the law, and perhaps reflects the desire of many commercial parties to retain control over contract formation, by disapplying the traditional rules of offer and acceptance and by stipulating their own prerequisite for conclusion. This trend can frequently be seen in practice where, for example, standard disclaimers on email messages might read: "Unless specifically stated otherwise, this email (or any attachments to it) is not an offer capable of acceptance or acceptance of an offer and it does not form part of a binding contractual agreement."²⁴

21 At para 50, emphasis added.

22 The layers of intention in every contract are set out and discussed in G MacCormack, "Some problems of contractual theory" 1976 JR 70.

23 Stair refers to the three stages of contracting as "desire, resolution and engagement". The first two of these are insufficient to conclude a contract, so that "the only act of the will, which is efficacious, is that whereby the will...becomes engaged to that other to perform" (Stair, *Institutions*, 1.10.2).

24 With thanks to an anonymous practitioner who provided a number of such examples from her own experience.

A third possible interpretation of the judgment does not rely on intention, but on the terms of the contract itself. Arguably, the contract was formed *but for* the presence of an express (but unwritten) contract term. The express term in this case required proper execution of the contract document to finalise the deal, and was derived from the past dealings between the parties. This argument is simply an application of the classic rule in *McCutcheon v David MacBrayne Ltd*²⁵ as to the implication of terms by a course of dealing; in the current case Drambuie was able to show that previous contracts between the parties had been formally executed and their dealings had consistently been regulated with “a significant degree of formality.”²⁶ Accordingly, the agreement reached between the parties was not elevated to a legally enforceable contract because the final draft had not been signed, in contravention of the implicit term as to execution.

Which of these three interpretations, if any, is to be preferred? It is likely that Lord Clarke’s decision was influenced by all these factors. There is certainly judicial support (considered above) for the second option, which indicates a development of the role of contractual intention. Whether or not the role of intention will continue to be developed in this vein by the courts remains to be seen. An increase in the role of contractual intention should be welcomed, since this allows parties to take control of the moment of formation and thereby avoid the disputes as to formation which arise from application of the simplistic, and arguably out-dated, principles of offer and acceptance to the complex world of commercial negotiations and business practices.²⁷ Although a full discussion as to the applicability of the rules of offer and acceptance to contracts in the twenty-first century is beyond the scope of this case-note, there is a considerable divergence between commercial reality and the theory of contract formation. An expanded doctrine of intention as suggested in the second option could therefore allow parties to determine their own moment of contract formation, in accordance with their intentions, and create greater certainty as to their legal liabilities.

(2) Good faith

Despite the legal rationalisation of the judgment, the facts of the case arouse sympathy for the pursuers. Lord Clarke commented on Drambuie’s “somewhat cynical” actions and noted that Drambuie “could be seen to have exploited the longstanding, amicable and successful commercial relationship between the parties”²⁸ for its own ends. Given these observations regarding Drambuie’s conduct, it is disappointing that issues about good faith were not raised by either counsel or judge in this case, and the opportunity to consider what role, if any, it has in Scots law was lost.

Perhaps this reluctance to introduce a good faith argument reflects the limited role it has played to date in Scots law²⁹—a situation which enabled Lord Clarke to comment that his quest to decide the legal issue “cannot be driven by any view about the moral

²⁵ 1964 SC (HL) 28.

²⁶ At para 50.

²⁷ It is interesting to note that offer and acceptance, as a mechanism for determining formation of contract, was not advanced by *either* party in this case, nor raised judicially.

²⁸ At para 52.

²⁹ For a general discussion of good faith in contract law see McBryde, *Contract* ch 17.

behaviour or the commercial manners of the parties.”³⁰ However, although McBryde states that “there is no single principle of good faith”³¹ in Scots law, both he and MacQueen provide examples of the use of good faith as a latent concept in Scots law, operating, for example, in actions for undue influence, the requirement to perform a contract within a reasonable time, and the requirement not to prevent performance by the other contract party.³² In this way, it can be seen that good faith does enjoy recognition in Scots law, but this role “has been expressed by way of particular rules rather than through broad general statements of the principle.”³³

Despite these examples, good faith at the stage of contract negotiations has been rejected by the courts in the past.³⁴ Liability for pre-contractual expenditure was considered in *Dawson International plc v Coats Paton plc*³⁵ by Lord Cullen who, following analysis of the case-law in this area, concluded that such reimbursement was only available where the pursuer had acted “in reliance on the implied assurance by [the defender] that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract”.³⁶ Where there was no such assurance from the defender then the pursuer had no remedy, unless there was evidence of *mala fides* or misrepresentation to enable a claim in delict.³⁷ Lord Cullen also maintained that “any tendency to extend the scope of the remedy is to be discouraged.”³⁸ Accordingly, only where the pursuer could show that the defender had acted in such a way to give an implied assurance of a concluded contract, would an action for pre-contractual liability succeed.

Further, even where a claim for pre-contractual liability is successful, the pursuer’s remedy is reimbursement of expenditure, rather than damages,³⁹ and in any event such a claim would certainly not operate to conclude a contract where substantive principles of contract law would otherwise deny one. This can be compared with a more developed principle of good faith in Europe: for example Dutch law awards expectation damages, intended to place the pursuer in the position in which it would have been had the contract been performed, where one party breaks off negotiations in

30 At para 52. In light of Lord Clarke’s other comments in this paragraph, it is to be presumed that his reference to moral behaviour and commercial manners was directed at Drambuie. However, as noted at note 9 above, Karoulis’ commercial tactics were also questioned, so a wider reading of this quotation could potentially encompass both parties.

31 McBryde, *Contract* para 17-25

32 See H L MacQueen, “Good faith”, in H L MacQueen and R Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (2006, forthcoming).

33 H L MacQueen, “Good faith in the Scots law of contract: an undisclosed principle?”, in A D M Forte (ed), *Good Faith in Contract and Property Law* (1999) 5 at 33.

34 See McBryde, *Contract* para 5-60, who makes reference to the House of Lords decision in *Walford v Miles* [1992] 2 AC 128, and MacQueen’s summary of good faith in Scots contract law, “Good Faith in the Scots Law of Contract”, note 33 above, particularly note 4 thereof.

35 *Dawson International plc v Coats Paton plc* 1988 SLT 854.

36 *Dawson* at 866.

37 *Dawson* at 865.

38 *Dawson* at 865.

39 Known as “Melville Monument liability”: see *Walker v Milne* (1825) 2 S 379 (2nd ed, 338) and McBryde, *Contract* para 5-63

breach of the good faith requirement.⁴⁰ Admittedly this is only operative where the negotiations are far-advanced, but Karoulias would arguably meet this requirement on the facts of the case. Perhaps then the issue is whether Scotland is out of step with the rest of Europe?

It is therefore instructive to consider the European approach—particularly in a case involving cross-border negotiations and a Greek pursuer. Article 1:201 of the Principles of European Contract Law requires both parties to a contract to “act in accordance with good faith and fair dealing.”⁴¹ Further, Article 2:301 requires parties to *negotiate* in good faith and any party which breaks off negotiations contrary to the requirement of good faith will be liable for losses caused. This European standard of good faith might well be regarded as onerous and uncommercial by practitioners in Scotland, accustomed to notions of freedom of contract, but would almost certainly have defeated Drambuie’s attempts to keep Karoulias waiting while its negotiations with a third party distributor were ongoing. The influence of Civilian legal systems and European contract codes, such as the Principles of European Contract Law or the Common Frame of Reference currently being developed, may therefore have a significant impact on Scots law in the future.

There is, however, a difference between the continental doctrine of good faith, which places contracting parties under a positive obligation, and a lesser duty which requires only the absence of bad faith. This lesser standard would not necessitate compliance with duties of disclosure, co-operation or loyalty, but would prevent unreasonable or cynical conduct capable of creating false or misleading impressions. Seen in this way, the principle of good faith would operate as an “excluder principle”, that is, by “merely excluding the unreasonable rather than imposing positive standards of conduct.”⁴² And this standard of “good faith” would arguably still be sufficient to encompass Drambuie’s unreasonable actions in this case.

The question remains whether or not an attempt to invoke this excluder principle in *Karoulias* would have been successful. If any case could prove an appropriate test case for such a principle, then *Karoulias* is (or was) it. It would be possible to argue that Drambuie’s actions amounted to “an implied assurance” that there was a contract between the parties.⁴³ The existence of a final draft agreement, acknowledgement from both sides that negotiations had concluded, their long-term amicable relationship, and Drambuie’s conduct in continuing to make positive overtures⁴⁴ right up until four weeks before termination, all amounted to “cynical” and “misleading” conduct⁴⁵ and would certainly present strong facts on which to argue for such a remedy.

Karoulias did not in fact make any judicial claim for pre-contractual expenditure, although evidence brought suggests that it did incur such expenses. It may be therefore

40 See H Beale, A Hartkamp, H Kötz and D Tallon, *Cases Materials and Text on Contract Law* (2002) 262-264, although they observe that this remedy has not so far been awarded by the Dutch courts; see also MacQueen, “Good Faith in the Scots Law of Contract”, note 33 above, at 21.

41 Article 1:201 also provides that it is not possible to exclude this duty.

42 MacQueen, “Good faith”, note 32 above.

43 As per the test in *Dawson*, note 35 above.

44 The email of 2 June emphasising Drambuie’s commitment to Karoulias being the most obvious of these.

45 The descriptions applied by Lord Clarke at para 52.

that Drambuie had already reimbursed it for this or, alternatively, that the amount was so low as to be insignificant compared to the value of the five-year contract for which it was suing. However, the fact that Karoulias did not include pre-contractual expenditure in its claim may also explain why it did not raise any argument as to good faith: from a practical point of view it would have seemed a challenging prospect which, even if successful, would have no direct benefit for their contract claim.

Consequently, the issues of morality and bad faith in commercial dealings entitled Karoulias to a sympathy vote from Lord Clarke but, absent a plea of an overarching principle of good faith in Scots contract law, they did not translate into a commercial remedy.

D. CONCLUSION

As for the future impact of this decision, it would be possible for courts to limit its effect, if so desired, to no more than a confirmation of the role played by the rebuttable presumption of intention in contract formation. However, it is submitted that there is certainly scope in the judgment for a more expansive application of Lord Clarke's decision. Commercial parties in future may well wish to take advantage of this clear indication that they can dictate their own requirements for execution of contracts and, providing their intention is sufficiently clear, circumvent the rules of offer and acceptance by imposing additional hurdles before a legally binding agreement comes into existence. Good faith, however, remains unexplored.

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The Aliens have Landed! Freedom of Speech Arrives in Scotland

A. INTRODUCTION

The purpose of this article is to consider the extent to which the introduction of the Human Rights Act in 1998 has changed the legal regime under which broadcasters operate, although it will also look at the effect of the Act on other media. It will concentrate on the major problem areas for broadcasters, namely: our laws on pre-trial publicity in criminal cases, that is, the law of contempt of court; defamation; the liability of internet service providers; privacy; and the interpretation of section 12(3) of the Human Rights Act in Scotland.

Most broadcasters in Scotland welcomed the introduction of the Human Rights Act, anticipating that it would give force to the concept of freedom of speech. Traditionally, Scots law has minimised the recognition given in other jurisdictions to freedom of speech. Our contempt of court laws have appeared out of sympathy with the idea of broadcasters (and other sections of the media) of being allowed to inform the